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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. JOSE DANIEL RODRIGUEZ, Defendant and Appellant.	A118764 (San Mateo County Super. Ct. No. SC055288)

Defendant Jose Daniel Rodriguez appeals from his conviction after jury trial for numerous sex offenses against four children on a variety of grounds, seeking reversal of his conviction and remand to the trial court for a new trial with directions to preclude certain evidence. We affirm the trial court judgment, with the abstract of judgment modified to correct two undisputed errors.

BACKGROUND

In December 2003, the San Mateo County District Attorney filed an information against defendant alleging 44 counts of sodomy, oral copulation, rape, attempted sodomy, and lewd and lascivious conduct with minors under the age of 14, as well as related enhancement allegations. The counts and allegations alleged that defendant had committed sex offenses from 1992 to 1995 against four minors, the children of his cousin Blanca and siblings in one family, they being two brothers, Cesar and Rafael, and two sisters, Evelyn and Sandra. After the amendment of the information and dismissal of some counts, defendant was tried in 2007 on 33 of the original 44 counts.

Evelyn's Testimony

Evelyn, born in 1981, testified that defendant stayed at her family's home on Third Avenue in Redwood City, probably beginning in 1992. Four or five months after his arrival, after she came home from school, he grabbed her arm and pushed her onto the couch where he slept, pulled down her pants, penetrated her vaginally and in her anus, and told her that he would kill her if she told her mother. He repeatedly penetrated her, sometimes every other day, sometimes once a week, at the family's home on Third Avenue. She orally copulated him "probably eight times." When she said no to him, he would take out a knife that he carried, cut himself, and tell her that is how she would bleed if she did not listen to him. He showed her the knife six or seven times at the Third Street house. Four or five times, defendant shot a BB gun at cans in the backyard and told her this was what was going to happen to her if she did not do as he said.

Evelyn testified to other incidents at the Third Avenue house involving defendant's conduct towards her siblings. Once, she saw defendant and Cesar in bed, defendant's pants on the ground and Cesar's pulled down, Cesar on his stomach and defendant behind him. On another occasion, after she refused to go into the bedroom with defendant, he grabbed her younger sister Sandra and took her into a room, and Sandra came out crying. When Cesar tried to confront defendant about it, defendant pushed him out of the way and left. Once, defendant took her younger brother Rafael into a bedroom and closed the door, and Rafael was crying when he came out. On another occasion, defendant told Cesar to take Rafael into a bedroom and do what defendant had done to Cesar. When Cesar refused, defendant grabbed them both and told them to do what he said. She heard defendant inside the bedroom telling Cesar, "That's not how you do it. Here's how you do it," and heard Rafael crying.

Sometimes defendant would tell Evelyn he wanted her to come out when he knocked on her locked bedroom door at night. If she did not, he would tell her that her mother would get in trouble because of what Cesar was doing to Rafael.

Defendant moved out of the Third Avenue house, but he continued his sexual assaults on the children at his apartment. He would come by the house and offer Blanca

to take the children out and, when Blanca looked away, he would take out his knife; the children would then ask if they could go out with him. He would take Evelyn to his apartment and penetrate her with his penis or fingers, and have her orally copulate him while showing her pornographic films. He took her into his bedroom six or seven times. Cesar took Rafael into the bedroom at his apartment "probably twice." Defendant continued to threaten them by telling them he would call the police, and that their mother and Cesar would go to jail.

The family moved to Elm Street in 1994. Defendant would take them to Sequoia Station in Redwood City, where he penetrated Evelyn five or six times in a car in the parking lot. He also grabbed her breasts and orally copulated her two or three times.

Defendant moved into their Elm Street house for a couple of months, where he continued his assaults. He would pinch Evelyn on the butt and have sex with her. He also took Rafael and Sandra separately into a room with him, and they each were crying when they came out. He left the day after her mother saw him pressing against Evelyn in the laundry room.

Evelyn did not disclose what defendant had done for some time. For example, she did not tell Child Protective Services representatives, who investigated a complaint that her mother beat the children a few days after defendant left the Elm Street house, for fear that the family would be broken up. In 2003, when Sandra told her that defendant might be moving back to Northern California, she told her mother what defendant had done.

Evelyn did not tell her mother at that time about Cesar's sexual abuse of the younger children because she did not want to cause harm to Cesar, and she told Rafael not to say anything about Cesar abusing him because she thought Cesar was a victim. She told social workers and police that she first learned about Cesar molesting Rafael and Sandra in 2003, but she testified at trial that she knew all along about Cesar's actions. She tried to protect Cesar, and hoped that Sandra would change her mind and that no one would believe Rafael because of his mental problems. She did not want to hurt her parents more, and she was scared and worried for Cesar.

Sandra's Testimony

Sandra, born in 1987, testified that defendant began touching her between her thighs and chest when she was five or six, but did not initially touch her vagina; he would put his penis between her legs and rub, and he ejaculated. Once he tried to put his penis inside her but could not. When she cried and told him to stop, he turned her around and penetrated her anus. She did not remember the exact number of times he ejaculated inside her when they lived on Third Avenue, but it was more than once.

When they lived on Elm Street, defendant once took her into his bedroom and, with her pants down, rubbed his penis on top of her vagina. Defendant rubbed his penis on her body more than once. Sandra thought he touched her in the vaginal area with his penis more than 30 times. He had her orally copulate him twice, and anally penetrated her with his penis two or more times. She did not recall any incident between her and defendant at Sequoia Station.

Sandra also testified about defendant's conduct with her siblings. Defendant took Evelyn and Rafael separately into his room, and they would each come out crying. He once had her orally copulate him and Rafael orally copulate Cesar at the same time. Once, defendant took Rafael up to the attic where defendant worked at Paw Prints, and she heard Rafael crying. Sandra once walked in on defendant and Evelyn, and saw defendant's shoulders and Evelyn on the bed, and when Evelyn came out of the room she was crying and was sweaty. Defendant would yank a resisting Rafael into the bedroom.

Defendant threatened the children by saying that if they ever told their mother what he had done they would regret it. He told them that their mother would not believe them and would go to jail.

Cesar sexually assaulted Sandra two or three times a month. He penetrated her anus occasionally, but did not penetrate her vagina. Cesar continued to assault her until she was about 11 years old. He also would pull Rafael into the bedroom, and Rafael would come out crying.

Sandra told her mother about what defendant and Cesar had done in June 2003, when she learned that defendant might be moving back in with them. She was afraid to

tell because she thought no one would believe her, and defendant had told her that her mother would go to jail. She told police and counselors that her mother knew all along about Cesar, which was not true, because Sandra did not want to go home, but she later said that her mother did not know. When the younger children were taken from the home, Evelyn told Sandra to say that her allegations about Cesar were not true.

Rafael's Testimony

Rafael, born in 1983, testified that he was being treated for paranoid schizophrenia. Defendant moved below to exclude Rafael's testimony based on his delusions, which the trial court denied; defendant argues on appeal that the court's ruling was prejudicial error. We discuss his appellate argument, and Rafael's testimony about his delusions, further in part II *post*.

Rafael testified that after he came to the United States in 1993, defendant would come over to the house, pull down Rafael's pants, and rape him. Defendant once touched Rafael at the "new house" (perhaps referring to the Elm Street house). Defendant once told him that if he wanted to play Nintendo, Rafael would have to have sex with him first, which then occurred. Defendant told Rafael that he would kill him if he told the police.

Defendant also told Cesar to rape Rafael, and Cesar did so for several years. During one incident, when Cesar came out of a room with Sandra, defendant slapped her and said that if she did not want sex, Cesar should "take" Rafael. Cesar then grabbed Rafael and raped him. Rafael slept in the same room as Cesar at Elm Street, and estimated that Cesar raped him 2,000 times. He also testified that he believed that extraterrestrials told him that Cesar had molested him 20,000 times, and that he believed this was true. Once Cesar held a long kitchen knife to Rafael's neck when Rafael did not want to have sex with him and another time, Cesar used the knife to walk Rafael to a room. He raped Rafael both times.

Rafael also testified that defendant and Cesar assaulted his siblings. Defendant raped Sandra at Sequoia Station. One time, Rafael acted as a lookout in case anyone approached while defendant took Evelyn into one area and Cesar took Sandra into another.

Rafael also testified that he had been mistreated by his mother and siblings. Among other things, he testified that his mother hit him with a jump rope and three-foot stick, then told him to lie to authorities when he complained. She hit him with a belt because he did not speak English at Elm Street. In his view, his mother, Sandra, and Evelyn mistreated him in other ways as well.

Cesar's Testimony

Cesar, born in 1978, testified that he was a convicted felon serving a 10-year sentence for lewd and lascivious acts committed against Sandra. He said that he was not promised anything in exchange for his testimony.

According to Cesar, defendant began committing sexual acts on him a few months after coming to live with the family in 1991. Defendant showed Cesar a pornographic movie and asked Cesar to let him do things to him that were shown in the movie. Defendant got behind Cesar, pulled down his pants, and tried to penetrate Cesar's anus with his penis, but did not do so. Defendant told him not to tell anyone.

Defendant committed "countless," and more than 20, similar acts of sodomy on Cesar at the family's Third Avenue house. Defendant engaged in sexual conduct with Cesar three or four times a week while he lived there, including at a Safeway underground parking garage at Sequoia Station and where defendant worked. Cesar also engaged in sexual conduct with defendant one time at defendant's residence.

Cesar also described sexual assaults by defendant on his siblings. Cesar saw defendant tell Sandra to put defendant's penis in her mouth when she was four or five years old, which she did. At a later time, Cesar saw defendant have sex with Rafael. Defendant had sex with one or another of Cesar's siblings about six times at the Safeway parking garage. Defendant had sex with Evelyn and sodomized Rafael and Sandra there. At the Third Avenue house, defendant would go into a bedroom with Evelyn, they would argue and his sister would cry, and they would come out 20 to 45 minutes later, with Evelyn always upset, but Cesar did not actually see them have sex there. Defendant would separately take Sandra and Rafael into the room, and Rafael would come out crying. When Rafael would refuse to have sex with defendant, defendant would pull him

in a forceful way. Rafael would be in defendant's room for 20 to 25 minutes, and come out crying.

Defendant told Cesar to engage in similar sexual conduct as he, and Cesar did so. Defendant would tell Cesar to have sex with Rafael, and Cesar would then penetrate Rafael after holding him down. Rafael cried and appeared to be in pain. Cesar did this repeatedly to Rafael. Defendant told him it was normal. Cesar also brought Sandra into his room, pulled down her pants, and put his penis between her legs and moved back and forth. He penetrated her anus, sodomizing her two times a month at least.

At his apartment, defendant would take Evelyn and Rafael to his room. Cesar sodomized Rafael 10 to 15 times at the apartment. Cesar would tell Rafael to put his mouth on his penis, or defendant would penetrate him.

Defendant told Cesar that if he told his parents what defendant had done, defendant would tell them about Cesar's actions and would call the social workers on his mother. He also told Cesar he would be in trouble if he told anyone.

After the family moved to Elm Street without defendant, Cesar continued to sexually assault Rafael and Sandra. He assaulted Rafael two to three times per month, and Sandra once a month. When defendant moved back in with the family, Cesar engaged in sodomy with him almost every night. Cesar saw defendant take Evelyn twice to a room, and Rafael more than six times. When defendant permanently moved out, Cesar continued to sexually assault Sandra and Rafael. He stopped assaulting Sandra when she was 19 because she told him it was not right. He stopped assaulting Rafael about four months later, when he moved out of the house.

In 2003, Evelyn told him that she and Sandra had told their parents what defendant had done to them. Cesar told them not to be afraid and just tell everything. His siblings told him they were not going to tell on him.

When police contacted him, Cesar did not tell about his assaults on Rafael and Sandra because he was afraid of going to jail and not seeing his family again. He told police what defendant had done, but did not tell them what he had done.

In January 2004, Cesar argued with Sandra and pushed her. Sandra said she was going to kill herself, so Cesar called the police, and Sandra was hospitalized. A couple of days later he admitted to his parents what he had done to Sandra and Rafael.

About two years later, Cesar entered a guilty plea to three counts of sexual assault regarding Sandra. He lied about the severity of some of his acts and the number of times he had assaulted her. He was not charged for offenses against Rafael, so he faced a 12-year sentence, rather than a life sentence. He was serving a 10-year term, having been convicted of three sex offenses against Sandra.

Defendant's Testimony

Defendant, born in 1969, testified that he moved from El Salvador to Redwood City in 1990, and moved into the Third Avenue home soon thereafter. He was hired at Chili's in Menlo Park, where he worked for about a year, leaving the house about 5:30 a.m. and returning about 4:30 p.m., when adults and the children were home. He started working at Paw Prints from September 1991 to April 1995, where he worked from 8:00 a.m. to 5:00 p.m., arriving home about 5:15 p.m. to 5:20 p.m.

Defendant stated that he did not engage in any sexual acts with Evelyn, Sandra, Rafael, or Cesar. He never told Cesar to have sexual contact with Evelyn, Sandra, or Rafael. He never had any pornographic or sexual materials, and did not show any such materials to the children. He did not threaten the children, did not tell them that he would tell about Cesar's homosexual behavior if they reported defendant, and did not tell them that he would call Child Protective Services or that their mother would end up in jail if they reported him for molesting them. Defendant went to Sequoia Station six or seven times with Cesar to listen to music, but usually walked and, even when he drove, did not go into the underground parking lot.

During the times defendant lived with the family, he saw the children's mother, Blanca, use physical force against Evelyn, hitting her with a ruler. He saw marks on Evelyn's back and legs and a small cut on her leg from when Blanca had hit her with the buckle of a belt. He also saw Blanca hit Rafael with a ruler, belt, or "whatever she

could." He did not see her hit Cesar or Sandra. Defendant did not have any intention of returning to Redwood City in 2003, and did not tell anyone that he intended to return.

Other Testimony

Reverend Ana Lange-Soto testified that Blanca, Evelyn, Rafael, and Sandra came to talk with her in June 2003. Blanca told her that defendant had molested the children when he lived with them. Blanca told the children to tell the pastor everything, and the girls gave some details, but they made no mention of Cesar's offenses. However, when Blanca left the room, they told the pastor about Cesar's molestation of Rafael and Sandra. The pastor told the children to tell their parents, but Evelyn said no, and the children asked the pastor not tell anyone. The pastor did not tell anyone about Cesar because she did not think there was a present risk. The People also presented the testimony of an expert on child abuse accommodation syndrome.

Defendant's employer at Paw Prints testified that defendant worked from 9:00 am to 5:00 p.m., Monday through Friday. He did not have a position that permitted him to leave the premises, and he was absent from work only a few times for a week. He only had a half-hour lunch break.

Verdicts, Sentencing, and Appeal

Defendant was found guilty by the jury on all but two counts, these two being the charges that he engaged in oral copulation with Cesar, and all related allegations were found to be true. In July 2007, the court sentenced defendant to state prison for an unstayed term of 96 years. Defendant filed a timely notice of appeal.

DISCUSSION

I. *The Court's Denial of Defendant's Motion to Suppress*

Defendant argues that the trial court committed prejudicial error by denying his motion to suppress and exclude the statements he made to a detective in an interrogation occurring a week after his arrest, on September 16, 2003. We find no error.

A. *Proceedings Below*

Detective Craig McIver testified at the hearing regarding defendant's motion that on September 9, 2003, while working as a Garden Grove Police Department investigator

assigned to the sexual assaults and child abuse division, he received a telephone call from Detective Banks of the Redwood City Police Department. About a month and a half or two months earlier, Banks had told McIver that he was investigating defendant, who had been accused of sexual assault crimes against children. Now, Banks told him there was an arrest warrant for defendant, provided defendant's date of birth, photo and suspected address, asked McIver to try and locate him, and told him not to ask defendant anything. Banks did not give McIver any specific details about the crime involved, but McIver obtained a copy of the warrant that listed the charges against defendant.

McIver further testified that he and his partner located defendant at his place of employment and arrested him. When defendant asked why they were arresting him, McIver responded that it was for an outstanding warrant out of Redwood City, and that he had no details and did not know anything about the case. Defendant stated that "he would rather talk to his attorney about this warrant." McIver told defendant he was not going to ask him anything about the case and did not know anything about it.

McGiver testified that as he drove defendant to the Garden Grove Police Department, neither he nor his partner discussed anything related to the case, nor did they talk with defendant. McIver had no intention of interrogating him. Defendant was released to jail staff and transported to an Orange County jail. McIver wrote up defendant's statements in his arrest report the same day. He "most likely" faxed a copy of defendant's arrest report to Redwood City Police Department the next day, September 10, 2006.

Defendant testified that, when he was in the police car, McIver told him there was a million-dollar warrant out for him in Redwood City, that that was a lot of money, and asked whether defendant knew what was happening there and wanted to tell him about it. Defendant requested an attorney because he was being arrested without explanation. McIver said he was not going to ask him anything more. Defendant acknowledged that when Banks interviewed him the next week in Redwood City, he did not request an attorney.

McIver, upon being recalled to the stand, denied saying what defendant claimed he had said. McIver also testified about the contents of his arrest report. His report indicated that defendant had said he would rather talk to his attorney about the warrant, and that McIver was not going to ask defendant about the case because McIver did not know anything about it.

The parties stipulated that defendant was continually in custody from the date of his arrest through September 16, 2006, when he arrived in Redwood City, and that on that same day, Banks read defendant his *Miranda* rights, and that defendant understood them. Banks interviewed defendant and the interrogation was recorded. The parties also stipulated that Banks had not received or reviewed the arrest report prior to interrogating defendant, and that defendant was not arraigned, and a public defender was not appointed, until 1:30 p.m. that afternoon.

After hearing arguments from both sides, the court denied defendant's motion to exclude Banks's interrogation of him on the ground that defendant did not make a clear and unequivocal indication that he wanted an attorney to assist him with custodial interrogation. The court relied on *People v. Nguyen* (2005) 132 Cal.App.4th 350 (*Nguyen*) in its ruling.

B. *Discussion*

In order to protect a person's Fifth and Fourteenth Amendment rights against compelled self-incrimination, police must advise a suspect of his or her right to remain silent and of the right to counsel before initiating a custodial interrogation. (*Miranda v. Arizona* (1966) 384 U.S. 436, 467-470.) Defendant's suggestion to the contrary, the recitation of rights outlined in *Miranda* is required, " 'not where a suspect is simply taken into custody, but rather where a suspect *in custody is subjected to interrogation*.' " (*Nguyen, supra*, 132 Cal.App.4th at pp. 355-356; *People v. Buskirk* (2009) 175 Cal.App.4th 1436, 1449 [quoting same].) A suspect must either be subject to interrogation or interrogation must be impending or imminent. (*Nguyen,* at p. 356; *People v. Avila* (1999) 75 Cal.App.4th 416, 418 (*Avila*); *United States v. LaGrone* (7th Cir. 1994) 43 F.3d 332, 339-340 (*LaGrone*); see also *McNeil v. Wisconsin* (1991) 501

U.S. 171, 182, fn. 3 [the United States Supreme Court has "never held that a person can invoke his *Miranda* rights anticipatorily, in a context other than 'custodial interrogation' "].) Also, the suspect must express the "wish for the particular sort of lawyerly assistance that is the subject of *Miranda*. [Citation.] It requires, at a minimum, some statement that can reasonably be construed to be an expression of a desire for the assistance of an attorney *in dealing with custodial interrogation by the police*." (*McNeil,* at p. 178.) Once a person in custody has properly invoked his or her right to counsel, the person "is not subject to further interrogation by the authorities until counsel has been made available . . . , unless the accused . . . initiates further communication, exchanges, or conversations with the police." (*Edwards v. Arizona* (1981) 451 U.S. 477, 484-485 (*Edwards*).)

Defendant argues that he invoked his right to counsel when he was arrested the week before his interrogation and, therefore, his interrogation without counsel violated his rights under the Fifth, Sixth, and Fourteenth Amendments of the United States Constitution, and was inadmissible. This argument fails for two reasons.

First, there was sufficient evidence for the trial court to conclude that defendant did not invoke his right to counsel with regard to any present or imminent interrogation.[1] The circumstances of this case are similar to those found in *Nguyen, supra*, 132 Cal.App.4th 350, which the trial court relied on to deny defendant's motion. Police conducting a traffic stop, found drugs in a car and told Nguyen, a passenger, that she was being arrested. (*Id*. at p. 353.) Nguyen, holding her cell phone, announced that she intended to call her lawyer, and refused to cooperate with the arrest. (*Ibid*.) The officer forcibly arrested her, but did not attempt to interrogate her. (*Id*. at pp. 353, 355.) Later, at the police station, police advised Nguyen of her *Miranda* rights, but she waived them and made several damaging admissions, which she subsequently moved to suppress on

[1] The trial court's ruling indicates that it believed McIver's testimony, and we defer to that determination. We review the trial court's factual findings for substantial evidence (*People v. Wader* (1993) 5 Cal.4th 610, 640), and we do not question the trial court's judgments regarding witness credibility. (*People v. Ramos* (2004) 34 Cal.4th 494.)

the ground that she had invoked her right to counsel at the time of her arrest. (*Id*. at p. 353) The appellate court rejected her argument "[b]ecause the arresting officer did not attempt to question . . . defendant . . . and gave no indication he would do so later." (*Id.* at p. 357.)

Similarly, in *Avila*, *supra*, 75 Cal.App.4th 416, the court found that Avila's purported invocation of his *Miranda* rights via his counsel at an arraignment proceeding, a week before his custodial interrogation regarding a different incident, was not effective to apply to that subsequent interrogation. The court noted that "[n]one of the coercive aspects of custodial interrogation were present or foreshadowed at the time of the purported invocation." (*Avila,* at p. 423.)

Defendant contends that the facts in *Nguyen, supra,* 132 Cal.App.4th 350, are "totally different" than those here because defendant was arrested after the filing of charges and the commencement of an adversary proceeding. To the contrary, we think *Nguyen* and *Avila*, indicate that an event such as an arrest is not alone sufficient to create the threat of custodial interrogation necessary to effectively invoke the *Miranda* right to counsel. McIver's testimony indicates that while he arrested defendant, he did not interrogate him or use tactics that a reasonable person could interpret as suggesting interrogation, and that a custodial interrogation was not imminent at the time. McIver testified that he did not question defendant about the case or indicate that he intended to do so in the future, and that he told him that he knew nothing about the case. Defendant himself testified that he referred to talking to an attorney about the warrant, and did not testify that he did so with regard to any interrogation. Thus, there was substantial evidence to support the conclusion that McIver did not say or do anything which suggested that any of the coercive aspects of custodial interrogation were present or foreshadowed at the time of the arrest.

Defendant argues that because McIver testified that defendant said that he would "rather" talk to an attorney, defendant "demonstrated that he intended to talk with an attorney and did not intend to talk to McIver." Assuming that is the case, this argument

ignores that nothing in McIver's testimony suggests that McIver was interrogating defendant, or gave any indication that he planned to do so.

Defendant also argues that his statement to McIver that he would "rather" speak to an attorney was "a clear indication that McIver had attempted to get him to speak to him." We fail to see the merit of this argument. Defendant's expression of a preference to speak to an attorney, which, by his own testimony, he made in order to discuss why he was being arrested, did not transform his arrest into an interrogation.

Defendant further argues that the People misread the "impending or imminent" requirement stated in *Nguyen*, *supra*, 132 Cal.App.4th 350, because *Edwards, supra*, 451 U.S. 477, does not apply that standard in determining whether the suspect has invoked his right to counsel. *Edwards*, argues defendant, "suggests that when a person requests an attorney and does not speak with an arresting officer, it is very apparent that he does so because the officer has said something which causes the person to tell him that he does not intend to talk with him." This argument does nothing to address the facts of *Nguyen* and their relevance to this case. Furthermore, *Edwards* does not suggest that we assume the conclusion that someone must have been subject to interrogation because they requested an attorney. Defendant attempts to limit *Nguyen* by relying on a grossly overbroad reading of *Edwards* that we decline to apply.

Defendant also unsuccessfully attempts to distinguish *LaGrone, supra*, 43 F.3d 332, which the court relied on in *Nguyen*, *supra*, 132 Cal.App.4th 350. Defendant argues that the invocation of the right to counsel in that case was limited to an inquiry about a search, not in order to assist with interrogation, unlike here. We find no significant difference between defendant's limited request to speak to an attorney about an arrest warrant and *LaGrone*'s similarly limited request to speak to an attorney about a search warrant.

Thus, we conclude that, pursuant to *Nguyen*, *supra*, 132 Cal.App.4th 350, and *Avila, supra*, 75 Cal.App.4th 416, defendant could not rely on his reference to an attorney at the time of his arrest as an invocation of his *Miranda* rights with regard to his interrogation the following week.

We also find, as did the trial court, that defendant's limited reference to an attorney at the time of his arrest was not a clear and unambiguous invocation of his *Miranda* right to counsel, whether or not an interrogation was impending or imminent. The *Nguyen* court also held that, assuming Nguyen could invoke her *Miranda* rights in anticipation of a later custodial interrogation, she never clearly asserted her right to counsel. (*Nguyen, supra*, 132 Cal.App.4th at p. 358.) Similarly, according to McIver, defendant requested to speak to counsel specifically about his warrant, and defendant in effect acknowledged this limited invocation of counsel in his own testimony. Thus, defendant, like Nguyen, did not make clear that he was asserting his *Miranda* right to counsel. This is a second, independent reason for our affirmance of the trial court's denial of defendant's motion.

Defendant also asserts a violation of his Sixth Amendment rights, supporting his argument with citations to, and brief quotes from, certain Sixth Amendment cases without further analysis. He fails to address the evidence we discuss herein regarding the circumstances of his arrest, or that he was given, understood, and waived his *Miranda* rights prior to his interrogation the following week. Thus, defendant has not met his burden of persuasion regarding his Sixth Amendment claim. (See generally, *Utz v. Aureguy* (1952) 109 Cal.App.2d 803, 806.) In any event, the Sixth Amendment right to counsel is distinctly different from the *Miranda* right to counsel, and generally is unrelated and unconnected to the right to counsel in custodial interrogations. (*Avila, supra*, 75 Cal.App.4th at pp. 421-422.) Therefore, we reject defendant's Sixth Amendment claim.[2]

[2] In light of our ruling, we do not need to address the other issues debated between the parties, such as whether the information in McIver's arrest report was or should be imputed to have been known to Banks at the time he interrogated defendant, or whether the admission of the evidence regarding the interrogation was harmless error.

II. *Defendant's Motion to Exclude Rafael's Testimony*

Defendant argues that the trial court committed prejudicial error by denying his motion to exclude Rafael's testimony, requiring reversal of his conviction, and deletion of his two-year sentence, for sodomy against Rafael. We find no error.

A. *Proceedings Below*

1. *Rafael's Testimony at the Section 402 Hearing*

The court held a hearing pursuant to Penal Code section 402 to evaluate Rafael's competence to testify. Rafael testified coherently on direct examination about his personal information. He stated that he was in a courtroom to testify about sexual abuse, identified the judge, and stated that he knew the difference between a truth and a lie, answering questions to confirm this appropriately.

On cross-examination, Rafael testified about a number of obvious delusions. He said he had caused a computer breakdown in China due to a virus in his computer. Extraterrestrials, who had started talking to him the year before his testimony, told him that his father wanted to cut off his penis, that he had sexual abuse committed against him, and that his sister wanted to cut off his penis. He saw Jesus Christ with a time machine in his backyard about a year before also. He had been a victim of witchcraft, and the extraterrestrials had told him he had died. The extraterrestrials had started talking to him about a year before.

On redirect examination, Rafael identified defendant as having lived with the family on Elm Street. He described an incident when defendant sodomized him, said defendant told him he would kill him, and that his brother had been sexually abusing him as well, stating that his brother had done so "[m]any times. The extra terrestrials calculated about 20,000 times."

At this point, the court stopped the proceedings, indicated that it was not prepared to have Rafael testify at that time, and put Rafael on "standby" until it decided whether or not to allow him to testify.

The next week, Rafael testified further at the section 402 hearing. On direct examination, he testified that his recollections about the things that defendant and Cesar

had done to him at his home were from his own memory, and not from someone telling him what had happened. The alien voices were not present, nor was Jesus Christ, when defendant or his brother had molested him at his home. The aliens did not tell him what had happened to him in 1993. The first time he heard their voices in his head was Christmas 2006. He was no longer hearing voices, and had not heard them the week before when he testified. The aliens never showed him pictures of what happened to him when he was younger.

On cross-examination, Rafael testified that the extraterrestrials did not tell him what happened in 1993. They did tell him that Cesar had raped him 20,000 times. Rafael estimated these rapes at 2,000 times, but then said that he did not disagree with the extraterrestrial's estimate, and agreed when asked that he was saying that Cesar raped him 20,000 times. He also said that "they" put him inside Jesus Christ's time machine a year before his testimony and he went to 2004 for a week. He did not go to 1993 and did not see Cesar. During his time in 2004, the extraterrestrials talked about a lot of things, but not about defendant or Cesar, and he did not remember what they told him. He did not go back to the Third Avenue or Elm Street homes.

Rafael also thought the aliens were trying to turn him into a dog, because when he was alone they touched him, and his body hurt when they did. He told them to stop, but they did not say anything, and condemned him to the death penalty. As he sat there testifying, he did not think they had given him the death penalty, though they did not tell him that he was free from the death penalty. He did not know if it was true that the aliens talked to him. The last time they told him something was nine months before. They did not tell him things that he lived through in the early 1990's.

Rafael believed that his father was Jesus Christ, and that his father wanted to cut off his penis, as the extraterrestrials had told him. Neither his father or sister cut off his penis. One time in 2006, a force with wings, the Holy Spirit, part human, part with claws, put his penis in Rafael's anal area. Rafael was sometimes afraid of his sister, and believed the President would protect him from her.

Rafael further testified that the extraterrestrials saw what Cesar did to him in 1993 and laughed about it. Cesar continued to rape him from 1994 to 1998, but the extraterrestrials did not tell him that they saw some of those rapes also. They saw everything, but their voices did not tell him what they saw. When asked how he knew what they saw and what they said about it, Rafael said, "Because I heard—I would hear voices. I saved my life, so as not to hear them because they were complaining a lot."

He further testified that "evil people" were still scratching his body, and showed scratches on one of his legs. There were worms in his head for the past year moving around, but they did not make it hard for him to remember things. Jesus Christ put the devil's paw on his right leg, and put a tail on the back of his body, but they went away with the time machine.

Rafael also stated that the extraterrestrials had not told him anything about his mother or Third Avenue beyond what he had already testified about, and did not tell him anything about what happened when he lived on Elm Street, when Cesar still raped him. However, he had testified earlier that the extraterrestrials told him about Cesar doing things to him before 1998, and he was living on Elm Street before 1998.

On redirect examination, Rafael said he was taking his medication every day, heard voices less, and that the Holy Spirit and Jesus Christ were waiting and hiding, but were not paying attention to him and not talking to him as long as he took his medication. No one was talking to him as he testified. He understood he was to testify from his memories, not what the aliens told him, and stated that he could do so.

On recross-examination, when asked "if I said Cesar raped you 20,000 times, would it be a truth or a lie," Rafael answered, "It would be the truth."

2. *The Court's Ruling*

After hearing arguments from counsel, the court denied defendant's motion. Relying on the Supreme Court's discussion regarding a trial court's determinations about the competency of a witness to testify in *People v. Anderson* (2001) 25 Cal.4th 543 (*Anderson*), the court noted that Rafael testified that the voices started talking to him in the last three years or less, which was not in the time period in question, and that his

delusions, "while they clearly are delusions, are not directly related to what happened to him in this case." As for his testimony that he was raped by Cesar 2,000 times, but that it was true that, as the aliens said, he had been raped 20,000 times, the court stated:

"I think in this kind of a case, we don't, again, know how many times these things allegedly happened. Clearly they happened a lot over a long period of time, and I don't think alleged victims of crime sit there and . . . mark down every time it happened. I think it kind of runs together. So, I'm not saying that I think someone would find it credible he was assaulted 20,000 times. But, I am saying that in someone's mind, it can run into a lot more than maybe factually happened, but that's not really the issue before me. [¶] The issue before me, is he able to recollect the questions, and is he able to testify from his own memory."

Defense counsel argued that Rafael was not testifying from his own memory if the extraterrestrials guided him to the 20,000 figure. The court disagreed with this statement "from the testimony," but agreed that Rafael was saying that the extraterrestrials said he was assaulted 20,000 times. The court then concluded that Rafael was competent to testify.

Rafael proceeded to testify, much of which we have already recounted in the background portion, *ante*. Along with his recollections of the sexual offenses that defendant and Cesar committed against him, he testified about his mental illness, the voices he heard, and many of the delusions and other beliefs he had stated at the section 402 hearing.

B. *Discussion*

Defendant argues that the trial court erred in admitting Rafael's testimony. We disagree.

Except as provided by statute, every person is qualified to be a witness and no person is disqualified from testifying to any matter. (Evid. Code, § 700.) A person is disqualified to be a witness if he or she is incapable either "of expressing himself or herself concerning the matter so as to be understood," or "of understanding the duty of a witness to tell the truth." (Evid. Code, § 701, subd. (a)(1) & (2).) Furthermore, "the

testimony of a witness concerning a particular matter is inadmissible unless he has personal knowledge of the matter." (Evid. Code, § 702, subd. (a).)

In *Anderson, supra*, 25 Cal.4th 543, our Supreme Court considered the claim that a witness's delusions that her imaginary son was present at the subject murder rendered her incompetent to testify about the murder. (*Id*. at p. 571.) The court summarized the rules regarding the trial court's evaluation of a witness's competency. It acknowledged that Evidence Code sections 700, 701, and 702 governed the competency of witnesses (*Anderson,* at pp. 572-574), and stated that "[c]apacity to communicate, or to understand the duty of truthful testimony, is a preliminary fact to be determined exclusively by the court, the burden of proof is on the party who objects to the proffered witness, and a trial court's determination will be upheld in the absence of a clear abuse of discretion." (*Id*. at p. 573.) The Supreme Court observed that "[u]nder the Evidence Code, the capacity to perceive and recollect particular events is subsumed within the issue of personal knowledge, and is thus determined 'in a different manner' from the capacity to communicate or to understand the duty of truth." (*Ibid*.) " 'Because a witness, qualified under [Evidence Code] [s]ection 701, must have personal knowledge of the facts to which he testifies ([Evidence Code] [s]ection 702), he must, of course, have the capacity to perceive and to recollect those facts. But the court may exclude the testimony of a witness for lack of personal knowledge *only if no jury could reasonably find* that he has such knowledge.' " (*Ibid*.)

The *Anderson* court noted that there was no serious claim that the witness could not communicate her memories coherently or understand that she must recount them truthfully. (*Anderson, supra*, 25 Cal.4th at p. 574.) The court focused on defendant's contention that she lacked the capacity to perceive and recollect her memories accurately because of her delusions about the presence of her imaginary son during the murder. (*Id*. at p. 574.) The court concluded that the trial court did not err. (*Id*. at p. 575.) It agreed with the trial court that there were "many indicia by which a rational trier of fact could conclude that [the witness], despite her specific delusions . . . had accurately perceived and recollected" the events of the murder and, aside from her insistence of her imaginary

son's presence, "presented a plausible account" of the circumstances of the murder. (*Id.* at p. 574.)

Defendant argues that "Rafael lacked the ability to tell the difference between the truth and his delusions and imaginations" because he insisted that the voices had told him, and he had believed, that Cesar had raped him 20,000 times. Defendant contends that this established that Rafael was incapable of understanding his duty to tell the truth, because he had no idea what was true, thereby failing to meet the standard required by Evidence Code section 701, subdivision (a)(2). Defendant cites *People v. Mincey* (1992) 2 Cal.4th 408, and *People v. Dennis* (1998) 17 Cal.4th 468, in support of his argument. Each case, however, found that the trial court did not abuse its discretion in finding the challenged witness competent to testify. (*Mincey*, at p. 444; *Dennis*, at p. 525.)

We are not persuaded by defendant's argument. Rafael testified both that he thought that Cesar had raped him 2,000 times, and that the extraterrestrials told him that Cesar had raped him 20,000 times, which he believed was true. To the extent this testimony was inconsistent, we agree with the trial court that it was not a basis for concluding that he did not know what was the truth about the relevant events. As the trial court indicated, Rafael's testimony indicated that he was sexually assaulted by Cesar many times over several years, and such events could run together in the mind of a witness and become difficult to estimate, particularly when events had occurred years before when the witness was a child. The 20,000 figure was not credible, but we think it was analogous to the woman's delusion about her imaginary son in *Anderson, supra,* 25 Cal.4th 543, in that it did not relate directly to Rafael's recollections of what he perceived at the time the offenses occurred. (*Id.* at pp. 572-575; see also *People v. Lewis* (2001) 26 Cal.4th 334, 356-357 [relying on *Anderson* to conclude that a witness had been competent to testify about the events in question and presented a plausible version of events, despite suffering delusions and giving sometimes incomprehensible testimony].)

There was no suggestion that Rafael's recollections of any of the relevant events indicated that he did not know what was true, or lacked personal knowledge about them. He expressed himself coherently, stated that he understood his obligation to tell the truth

based on his own recollections, and had sufficient personal knowledge to qualify as a testifying witness under the "rational trier of fact" test discussed in *Anderson*, *supra*, 25 Cal.4th 543. He consistently responded to questions with relevant, specific, and measured answers. He indicated that he was testifying about events involving defendant and Cesar from his own memories and did not hear voices when these events occurred, stated that the voices did not tell him about these events, distinguished between his own memories and what the voices told him, indicated he was taking his medication, and stated that he had not heard voices for nine months and did not hear them at the time he was testifying. Furthermore, his testimony was consistent with that of each of his siblings. Thus, there were sufficient indicia for the trial court to conclude that Rafael was competent to testify. It was for the trier of fact, not the trial court, to evaluate the credibility of his testimony. (*Id*. at p. 575.) The trial court did not abuse its discretion in finding Rafael was competent to testify.

III. *Defendant's Claim of Prosecutorial Misconduct*

Defendant argues that the trial court committed prejudicial error and violated his rights to due process and a fair trial pursuant to the Sixth and Fourteenth Amendments of the United States Constitution because it did not grant him a mistrial, or instruct the jury properly, after the prosecutor engaged in purported misconduct during her cross-examination of a witness and during her closing argument. We find this argument lacks merit.

A. *The Proceedings Below*

Andy Mazon was Sandra's former boyfriend. On direct examination, he testified that during the year or so that he went out with Sandra, in 2003 and 2004, he visited her home on Elm Street 30 or 40 times. He often saw Blanca slap her two younger children, Jonathan and Cindy, hit them "on the butt," and use foul language with them. He also saw Blanca chase these children while holding an electrical cord, followed by sounds of the children crying and screaming, though he never saw Blanca hit them with the cord. Sandra told him that her mother had beaten her worse, with electric cords, as had been the case with her brothers and sisters. Sandra also told him that Cesar had molested and

raped her, and molested her older brother and her sister Evelyn. In 2004, when Sandra was in the hospital, Blanca visited her and told her to stop talking about Cesar. Blanca was very close to Cesar, but she sometimes used bad language towards Sandra.

Mazon also testified on direct examination that he "broke up with Sandra because he could not deal with what was going on between her family," and that she attacked him when he returned one of her letters to her.

On cross-examination, Mazon acknowledged that he had spoken a couple of times to a defense investigator in the case. He further acknowledged that the investigator, Joseph Lopez, had come to his house and said he wanted to talk to him about a case involving Sandra, and basically explained what was going on in the case and why he wanted to talk to him. The following exchange then occurred:

"Q. Mr. Lopez, when he was talking to you, told you that this was about a case not involving Cesar, but somebody else who had molested Sandra, right?

"A. Yeah.

"Q. Okay. And he told you; did he not—I'm looking at his report—that he, that the defense in this case was that the mother had coerced Sandra into participating in a pact of silence to not talk about Cesar. Do you remember that?

"A. Yeah.

"Q. Okay. And then do you remember that he told you that the reason Sandra agreed to do that was because the mother was a very mean, aggressive, abusive, person who had forced all the kids into doing this?

"A. Yeah.

"Q. Okay. And you remember that he told you they had lots of evidence from the past when CPS had come into the home and had—basically they had—they had proof that the mother had used things like electrical cords on the kids in the past?"

Outside the presence of the jury, defense counsel objected to this entire line of questioning, arguing that the prosecutor misrepresented to the jury that it all was written in the investigator's report when it was not written in either investigator report, and that this was prosecutorial misconduct that required a mistrial. The prosecutor responded that

she had a good faith belief that the investigator had told Mazon about the CPS reports because Mazon's statement followed line by line the information from the CPS reports, and was "too closely tailored to the facts to have been spontaneous." The court concluded that the prosecutor asked the last, unanswered question without having a good faith belief that it was what happened. It denied the defense request for a mistrial and for an admonition to the jury about misconduct, and denied the defense's request to strike all four questions. The court then told the jury that it was sustaining the objection, that the last question was stricken, and admonished the jury to disregard that question.

On further cross-examination, Mazon acknowledged that Sandra had lied to obtain a restraining order against him as a result of their fight and that he was angry with her, but that he was happy for the restraining order, indicating that he did not want her to try to see him. He then testified further about Sandra's statements to him about the sexual abuse she had experienced. Sandra told him after she was taken from the hospital and put in foster care that she had more to tell him. When asked if she told him that she had been molested by her mother's cousin or her uncle, Mazon replied, "I don't remember if she told me that she was molested by the other person, but she told me that that other person molested her brother."

Subsequently, the defense moved again for a mistrial or, in the alternative, for a curative instruction, on the basis of the prosecutor's purported misconduct during her cross-examination of Mazon. The court denied the motion for a mistrial, and took the issue of a curative instruction under submission, stating that the proposed instructions went "too far," and that the court would "do something," but did not think the situation was "as outrageous" as the defense. Subsequently, the trial court admonished the jury as follows:

"Regarding the exhibits, Mr. Joseph Lopez, a licensed private investigator, testified previously he prepared two reports. . . . [¶] The court has reviewed the reports and the court is instructing the jury that the reports do not contain any statements that Mr. Lopez told Andrew Mazon any defense theory of the case or that Mr. Lopez had reports from Child Protective Services that Blanca Guardado used things like electrical cords on

her children, or that he had reports from Child Protective Services that would reveal any facts about Blanca . . . or suggested subjects that Mr. Lopez wanted Andy to confirm."

During her closing argument rebuttal, the prosecutor argued that, looking at the reports and Mazon's testimony, that he must have been given details of the case. The court overruled the defense objection to this statement, ruling that the prosecution was entitled to make the argument. The prosecutor continued, arguing that Mazon's testimony about Blanca's purported abuse was "preposterous" because during the time, late 2003 and 2004, the family was deeply involved with the police, CPS, and counselors, suggesting that Mazon was lying in his testimony, and implying that he was given information from a 1994 CPS record. The trial court overruled another defense objection to this line of argument. The prosecutor referred to Mazon's testimony that the investigator told him about the case and the defense theory that there was a plot orchestrated by a violent mother, at which point the defense again objected. The court sustained this defense objection. The prosecutor continued, arguing that Mazon "told so many lies it was ridiculous." When she stated, "Of course, we assume that he had been provided the facts before he gave his statements he admitted," the defense again objected that this was misconduct, which the court overruled.

B. *Discussion*

Defendant argues that the prosecutor's purported misconduct during cross-examination was somehow prejudicial to him. He further argues that, although the trial court initially sustained his objection to the prosecutor's question to Mazon, its allowing the prosecutor to make the challenged arguments to the jury amounted to a reversal of that ruling, violated his constitutional rights, and was prejudicial error. We do not find merit in either argument.

Defendant appears to argue, albeit in one sentence, that the prosecutor committed prejudicial misconduct in his cross-examination by suggesting that the defense had "schooled [Mazon] on the defense theory that the prosecutor had asked questions which suggested facts harmful to [defendant] absent a good faith belief on the part of the prosecutor." Although the People do not raise the issue, we refer to the basic principle

that the appellant bears the burden to properly brief and argue the issues presented. "To demonstrate error, appellant must present meaningful legal analysis supported by citations to authority . . . that support the claim of error. [Citations.] . . . [C]onclusory claims of error will fail." (*In re S.C.* (2006) 138 Cal.App.4th 396, 408.) "An appellate court is not required to consider alleged errors where the appellant merely complains of them without pertinent argument." (*Strutt v. Ontario Sav. & Loan Assn*. (1972) 28 Cal.App.3d 866, 873; see also *People v. Stanley* (1995) 10 Cal.4th 764, 793.) Defendant does not present any authority or legal argument to explain how the prosecutor's cross-examination was prejudicial misconduct, despite the trial court's sustaining of the defense objection to one of the questions, its instruction to the jury to ignore that question, and its subsequent admonition to the jury that the investigator reports did not contain statements that might have been implied by the prosecutor's questions (which admonition defendant does not mention in his opening brief summary of the proceedings below regarding the purported misconduct). Therefore, we disregard this argument. Were we to consider it, we fail to see the prejudice posed by these questions in light of the court's sustaining of defendant's objection to the cross-examination question, and its subsequent instruction and admonition to the jury.

Defendant further argues that the trial court effectively reversed its sustaining of his objection to the prosecutor's cross-examination question by permitting the prosecutor to "testify" to the jury that Mazon had lied. We reject this argument as well. "A prosecutor is allowed to make vigorous arguments and may even use such epithets as are warranted by the evidence, as long as these arguments are not inflammatory and principally aimed at arousing the passion or prejudice of the jury." (*People v. Pensinger* (1991) 52 Cal.3d 1210, 1251.) The prosecutor's " 'argument may be vigorous as long as it amounts to fair comment on the evidence, which can include reasonable inferences, or deductions to be drawn therefrom.' " (*People v. Wharton* (1991) 53 Cal.3d 522, 567-568.) Defendant fails to meet his burden on appeal of establishing that the trial court erred in allowing most of the prosecutor's rebuttal argument, or that the prosecutor could not argue that Mazon was lying. Once more, we refer to the basic principle that the

appellant bears the burden to properly brief and argue the issues presented, and that conclusory claims of error will fail. (*In re S.C.*, *supra*, 138 Cal.App.4th at p. 408.) Defendant also does not direct us to the investigator reports themselves, and we have no obligation to comb the record for them. (*Grant-Burton v. Covenant Care, Inc.* (2002) 99 Cal.App.4th 1361, 1379 [an appellate court may disregard any factual contention not supported by proper citation to the record].) Therefore, we disregard this argument as well.

Even if we consider defendant's argument, " '[t]o prevail on a claim of prosecutorial misconduct based on remarks to the jury, the defendant must show a reasonable likelihood the jury understood or applied the challenged comments in an improper or erroneous manner. [Citations.] In conducting this inquiry, we "do not lightly infer" that the jury drew the most damaging rather than the least damaging meaning from the prosecutor's statements.' " (*People v. Brown* (2003) 31 Cal.4th 518, 553-554.) Defendant does not establish that the jury was reasonably likely to understand the prosecutor's comments in an improper or erroneous manner, particularly in light of the court's admonition to the jury, its reference upon a defense objection during rebuttal to the prosecutor's right to present "argument," and the court's sustaining of a defense objection to the prosecutor's summary of Mazon's testimony a few moments later.

Furthermore, Mazon's testimony about the Blanca's violence was relatively inconsequential. Defendant argues that this testimony was related to the "crucial" issue of "whether the family was blaming [defendant] for the actions of Cesar and attempting to hide the fact that the mother . . . knew of Cesar's activities at the time they occurred." We do not see much of a connection at all between this theory and the prosecutor's casting aspersions on Mazon's testimony about the mother's physical abuse of some of the children. Also, there was other evidence that the mother had been abusive (i.e., Rafael's own testimony), and that the family had been reluctant to reveal Cesar's sex offenses. On the other hand, there was overwhelming evidence of defendant's guilt from the children's testimony, and Mazon himself testified that Sandra had told him of another

person who had committed sex offenses against one of her brothers. Any purported misconduct or error was undoubtedly harmless under any standard.

Also, given the briefness of any purported misconduct, its insignificance to the criminal charges at hand, and the court's rulings and admonition, we find no merit in defendant's summarily argued claim that the purported misconduct somehow infected the trial with such unfairness as to make the conviction a denial of due process under federal constitutional standards.

IV. *The Court's Imposition of Upper Term Sentences for Counts 9 Through 14*

The court sentenced defendant to the upper term of eight years on counts 9 through 14, which charged rape of Evelyn by means of force or fear. Defendant argues that the aggravating factors relied on by the trial court to impose the upper term sentence were not found by the jury beyond a reasonable doubt, thereby violating his Fifth, Sixth and Fourteenth Amendment rights under the United States Constitution pursuant to *Cunningham v. California* (2007) 549 U.S. 270, 281, *Blakely v. Washington* (2004) 542 U.S. 296, and *Apprendi v. New Jersey* (2000) 530 U.S. 466. The People argue that any error by the court is harmless in light of the jury's verdicts and findings. We agree.

Pursuant to the Sixth Amendment of the United States Constitution, a court may impose an upper term sentence based only on facts established by a jury beyond a reasonable doubt. (*Cunningham v. California*, *supra*, 549 U.S. 270, 281.) As an exception, a court may impose an upper term sentence based on a defendant's prior convictions without submitting that question to a jury. (*Id.* at p. 288; *People v. Sandoval* (2007) 41 Cal.4th 825, 836-837.) The finding of one aggravating factor is sufficient to make a defendant eligible for an upper term sentence. (*People v. Black* (2007) 41 Cal.4th 799, 813 (*Black*); *People v. Osband* (1996) 13 Cal.4th 622, 728.) Once established, additional facts found by a court in determining the appropriate sentence do not violate a defendant's Sixth Amendment rights. (*Black*, at p. 812).)[3] The record must reflect the

[3] Defendant argues on various grounds that the California Supreme Court, in *Black* and *Sandoval*, incorrectly interpreted the United States Supreme Court decisions in *Cunningham v. California*, *supra*, 549 U.S. 270, and preceding cases. He also correctly

court's reasons for imposing the term sentence selected. (Pen. Code, § 1170, subd. (b).) Any upper term sentences by a court found to violate the Sixth Amendment rights to a jury addressed in *Cunningham*, may be found harmless if a reviewing court concludes beyond a reasonable doubt that a jury would have found an aggravating factor true beyond a reasonable doubt. (*Sandoval,* at p. 839.)

Any error below was harmless because, as the People point out, the trial court imposed the upper term sentence in part because the victims, including Evelyn, were "particularly vulnerable." This is an aggravating factor stated in California Rules of Court, rule 4.421(a)(3). The trial court's vulnerability analysis plainly was based at least in part on the fact that defendant attacked Evelyn in their home. The court stated:

"This is one of the worst cases of sexual assault that I have seen. As was pointed out by the family, the defendant single handedly destroyed a family that had been kind enough to take him into their home. As I listened to the trial, I thought how awful it must have been for each of the [victims] to live in that house every day facing the prospect that they would each be sexually assaulted by the defendant day after day, week after week, month after month." The court continued, "The defendant raped and assaulted Evelyn continuously and turned her childhood into a living nightmare."

As our independent research indicates, "courts have recognized the vulnerability of those attacked while in their own home." (*People v. Hall* (1988) 199 Cal.App.3d 914, 922 [victim attacked in her own home]; *People v. Fields* (1984) 159 Cal.App.3d 555, 569-570 [referring to the vulnerability of the victim "in that she was attacked in her own home"].)

The jury guilty verdict on the charges involving Evelyn make clear that it necessarily found true all of the facts underlying the court's vulnerability analysis. Both defendant and Evelyn testified that they lived in the same home. Evelyn further testified that several months after moving in, defendant began sexually assaulting her at that home

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acknowledges that we are bound by our Supreme Court's decisions pursuant to *Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.) Therefore, we do not address these arguments further.

and that, as a result, she was afraid to be home by herself. In order to reach its guilty verdict, the jury necessarily determined beyond a reasonable doubt that many of the sexual assaults occurred in the home, as Evelyn and her siblings' testimony indicated. We conclude beyond a reasonable doubt that the jury would have found Evelyn "particularly vulnerable" beyond a reasonable doubt. For this reason alone, any sentencing error was harmless.

Furthermore, courts have acknowledged that the defendant's relationship to the victim is a circumstance rendering the victim particularly vulnerable. (See *People v. Garcia* (1983) 147 Cal.App.3d 1103, 1106-1107 ["[i]t is difficult for us to conceive of a circumstance wherein a child would be more vulnerable to such an offense than when the attack was perpetrated by a person entrusted with the victim's supervision or control"].) As the People point out, the court also imposed the upper term sentence because it found defendant had taken advantage of a position of trust, another aggravating factor. (Cal. Rules of Court, rule 4.421(a)(11).) The court's reliance on this factor could only have referred to defendant's undisputed role as the adult cousin of Evelyn's mother who lived with the family, and the evidence plainly indicated that as a result he had access to, and control over, the children (including when he took them elsewhere, such as to Sequoia Station and his apartment). Defendant's role rendered Evelyn particularly vulnerable, and allowed him to take advantage of a position of trust. We have no doubt the jury would have found that defendant's family role supported the "particularly vulnerable" and "position of trust" factors beyond a reasonable doubt as well.[4]

V. *Amendment of the Abstract of Judgment*

Defendant also argues that the abstract of judgment shows that enhancements under Penal Code sections 12022.3 and 667.61 to counts 26 and 44 respectively were stayed when they actually were stricken. The People concur that this was in error, and we agree.

[4] Given our conclusions, we do not address the remainder of the People's harmless error arguments.

The directions of the abstract of judgment form state that stricken enhancements should not be listed. However the trial court included references to Penal Code sections 12022.3 and 667.61 with regard to counts 26 and 44 respectively, when the record indicates that the court did not intend to impose sentence for these enhancements for these particular offenses. Therefore, the abstract of judgment should be modified to remove these references.

Respondent contends the abstract of judgment should be modified to show that defendant's offenses against Sandra occurred not only in 1992, but that at least one of the two oral copulation counts involved Sandra in 1995 as well. While Sandra testified that acts of oral copulation involving her occurred at the Elm Street house, and there was evidence that defendant moved into that house in 1995, the People do not establish the court's intention regarding these counts, nor that they have the standing as respondent to seek such relief from this court. Therefore we reject this request.

DISPOSITION

The abstract of judgment is modified to strike the references to Penal Code sections 12022.3 and 667.61 with regard to counts 26 and 44 respectively. The trial court is directed to forward a certified copy of the corrected abstract of judgment to the Department of Corrections and Rehabilitation. So modified, the judgment is affirmed.

_____
Lambden, J.

We concur:

_____
Kline, P.J.

_____
Richman, J.